Supreme Court, U.S.
FILED
MAR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-871

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE POTOMAC ELECTRIC POWER COMPANY,
Petitioner,
v.
STEPHEN H. SACHS, ATTORNEY GENERAL OF MARYLAND, and ADELE WILZACK, SECRETARY OF THE MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF II

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SUPPLEMENTAL BRIEF II

Petitioner, The Potomac Electric Power Company ("PEPCO"), submits this brief pursuant to Supreme Court Rule 22.6 in response to the Supplemental Brief recently filed by respondents. Respondents contend in their Supplemental Brief that there is no basis for further proceedings in this Court because the District Court routinely complied with the mandate of the Court of Appeals during the pendency of the petition for certiorari.[1]

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[1] In its first supplemental brief, PEPCO alerted the Court to the State's decision to drop its grand jury investigation, and noted

Contrary to respondents' suggestion, the order of the District Court dismissing petitioner's complaint—issued while the case was pending before *this* Court on petition for writ of certiorari—in no way deprives this Court of jurisdiction. The District Court order was issued as a matter of course upon receipt of the mandate from the Court of Appeals. It has long been settled that "the fact that the mandate of the Circuit Court of Appeals has issued [does not] defeat this Court's jurisdiction." *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 467 (1947). A similar claim was presented in *Carr* v. *Zaja*, 283 U.S. 52 (1931). Justice Holmes, writing for a unanimous Court, rejected the claim:

> It is objected that the mandate of the Circuit Court of Appeals was not stayed, but was issued to the District Court and spread upon its records and that therefore the case is finished. *But that does not defeat the jurisdiction of this Court.* [*Id.* at 53 (emphasis supplied).]

This Court clearly retains jurisdiction to review the decision below. If this Court grants the writ and remands for consideration of the preemption issue—as urged by PEPCO—the District Court would simply reinstate PEPCO's complaint. In this regard the case is no different from a typical case in which the judgment directs the payment of money damages or a fine. The satisfaction of the judgment while review is sought in this Court does not deprive this Court of jurisdiction. As the Court held long ago, "[i]f the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights." *Erwin* v. *Lowry*, 7 How. 172, 184 (1849). So too here, if this

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that the appropriate disposition of the case in light of that development would be to grant the writ, vacate the judgment below, and remand for consideration of the preemption issue. Respondents' supplemental brief is based on subsequent developments that PEPCO has not yet had an opportunity to address.

Court vacates and remands, it would be "the duty" of the District Court to restore PEPCO's complaint, since the complaint was only dismissed pursuant to a judgment vacated by this Court.[2]

Acceptance of respondents' argument would require those seeking review in this Court to obtain a stay in *every* case, lest entry of judgment upon the routine issuance of the mandate by the Court of Appeals be deemed to deprive this Court of jurisdiction. Yet such a rule would be wholly inconsistent with the standards frequently articulated by the Justices of this Court concerning *when* a stay is appropriate.[3] It has never been suggested that denial of a stay pending certiorari would deprive this Court of jurisdiction, simply because the mandate would thereby issue from the Court of Appeals. Since PEPCO would in no sense have been irreparably harmed pending review by this Court if a stay were denied, it would have been wholly inappropriate for PEPCO to seek a stay in this case.

The issuance of the mandate by the court below, and the action of the District Court upon receipt of that mandate, are simply irrelevant to the exercise of juris-

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[2] Respondents note that no appeal was taken from the District Court's action pursuant to issuance of the mandate. Resp. Supp. Br. at 4. PEPCO has, of course, appealed the sole basis for that action—the judgment of the Court of Appeals—to this Court, through the pending petition for certiorari. The suggestion that another appeal should have been taken to the Court of Appeals, and presumably another petition for certiorari filed, and the cycle repeated indefinitely as mandates issued seriatim from the court below, does not warrant serious consideration.

[3] *See, e.g., Bellotti* v. *Latino Political Action Comm.*, 463 U.S. 1319 (1983) (Brennan, J., in chambers); *Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315 (1983) (Blackmun, J., in chambers); *White* v. *Florida*, 458 U.S. 1301 (1982) (Powell, J., in chambers); *Barthuli* v. *Board of Trustees*, 434 U.S. 1337 (1977) (Rehnquist, J., in chambers); *Beame* v. *Friends of the Earth*, 434 U.S. 1310 (1977) (Marshall, J., in chambers).

diction by this Court.[4] Here, the District Court only acted pursuant to a decision presently under review in this Court. If this Court reverses or vacates that decision, the District Court can readily restore petitioner to its rights, as would be required by the mandate of *this* Court.

Respectfully submitted,

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[4] The State seems to concede that issuance of the mandate below does not normally defeat jurisdiction, but suggests a different result in this case because of the relief now sought by PEPCO, in light of the dropping of the state grand jury investigation. Resp. Supp. Br. at 6-7. If this Court has jurisdiction, however, it has jurisdiction to enter any appropriate order.